

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSIAH GALLOWAY, :
Plaintiff, : 19-CV-5026(AMD)
-against- : United States Courthouse
COUNTY OF NASSAU, et al., : Brooklyn, New York
Defendants. : January 11, 2022
3:30 o'clock p.m.

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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& PANEK
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produced by computer-aided transcription.

1 (All present by telephone.)

2 THE CLERK: This is civil cause for a motion
3 hearing, docket number 19-CV-5026, Galloway versus County of
4 Nassau, et al.

5 Before asking the parties to state their appearance,
6 I would like to note the following. Persons granted remote
7 access to proceedings are reminded of the general prohibition
8 against photographing, recording and rebroadcasting of court
9 proceedings. Violation of these prohibitions may result in
10 sanctions including removal of court issued media credentials,
11 restricted entry to future hearings, denial of entry to future
12 hearings and any other sanctions deemed necessary by the
13 Court.

14 Will the parties please state their appearance,
15 plaintiff first?

16 MR. HARVIS: Good afternoon, Your Honor. This is
17 Gabriel Harvis. I'm appearing on behalf of the plaintiff
18 Josiah Galloway and I have my law partner Baree Fett on the
19 line as well.

20 THE COURT: Good afternoon.

21 MR. SOKOLOFF: This is Brian Sokoloff, Sokoloff
22 Stern LLP, attorneys for the Nassau County defendants, at
23 least that's what we're hoping for.

24 THE COURT: Good afternoon.

25 MR. GARRY: And William Garry, Your Honor, for the

1 defendant, the Incorporated Village.

2 THE COURT: Okay. Good afternoon.

3 Anybody else?

4 Okay. So I received the objections to Judge Wicks's
5 report and recommendation and I want to talk to you a little
6 bit just really about the practicalities of all of this.

7 So I've read all of the materials including the
8 Assistant District Attorney's deposition and I agree that
9 there is surely a conflict in representing the Assistant
10 District Attorney but I'm wondering why, as a practical
11 matter, the Sokoloff firm has to be disqualified from
12 representing the other defendants.

13 I talked to Judge Wicks about this and, you know, I
14 have to say that for whatever it's worth, I'm not even sure
15 why an assistant district attorney testifying as a non-party
16 needed a lawyer at a deposition. It's not anything that I've
17 ever, different experiences from different counties, but the
18 usual concerns are really not present here. I mean, to the
19 extent that she needs representation, I feel as though this
20 conflict could be fixed by having someone else represent her.

21 The other observation that I would make is it's hard
22 for me to see that she would be, have much to say at a trial
23 because she did not have anything to do with investigating the
24 initial case. She investigated the case years after the
25 conviction and so it seems to me that the facts to which she

1 could testify to would be something that, things that aren't
2 really in dispute, that the district attorney's office
3 investigated the case and made the decision that they made. I
4 don't think she would be permitted to testify about her
5 opinions about the credibility of witnesses. I'm not sure
6 that that would be permissible.

7 So this is a very long way of saying it's something
8 that I'm still thinking over but I'm wondering -- and you
9 don't have to answer me today, I can even get submissions from
10 you if you want, but I don't really understand why they would
11 have to be disqualified from representing other defendants.

12 The case has been, it's not as old as some but it's
13 been kicking around for a long time and I'm wondering why,
14 while you mull this over, if it's worthwhile to have a
15 settlement conference about the case. Are you just too far
16 apart? If new lawyers start on this case, we'll be starting
17 sort of from square one at least in some respects and I don't
18 know if that's something that you want.

19 So I want to first ask the plaintiff. What do you
20 envision this witness testifying to at trial?

21 MR. HARVIS: Thank you, Your Honor. So in our view,
22 the ADA is really a very important witness in the trial
23 because there is a dispute between the parties about
24 Mr. Galloway's innocence, first of all, which is directly
25 relevant to his claims of civil rights violations because the

1 case law, you know, is pretty clear that innocent, you know,
2 the establishment of innocence is relevant to assessing
3 whether or not the officers engaged in the types of misconduct
4 that we allege and determining, you know, the legitimacy of
5 those claims.

6 You know, some of the key evidence of police
7 misconduct is accessible really only through the ADA's
8 testimony. If you take, for example, the statement that she
9 recorded in her notes where the victim says that the officer
10 told him that he had picked the right guy, you know, the
11 victim has been equivocal about that now.

12 THE COURT: Right.

13 MR. HARVIS: You know, in his deposition, he
14 suddenly has, you know, he has some confusion or lack of
15 recollection or lack of clarity on that so the best evidence
16 that we have in the record about that as from Ms. Anania.

17 THE COURT: So let me just pause right there with
18 this just before I forget.

19 So you would want to have her notes or her testimony
20 as a prior inconsistency, I guess, or to refresh his
21 recollection or from whatever, for whatever evidentiary,
22 whatever exception applies. And I'm just -- and I get that.
23 So that's one thing. So she wrote, took in her notes that he
24 said that they told him that he picked the right guy, correct
25 so far?

1 MR. HARVIS: Yes.

2 THE COURT: And then he is now saying I don't
3 remember if that's what they told me or something to that
4 effect, right?

5 MR. HARVIS: Correct. Correct.

6 THE COURT: Okay.

7 MR. HARVIS: And there are -- I'm sorry, Your Honor.

8 THE COURT: Go ahead.

9 MR. HARVIS: I was going to say that's just one of I
10 would say three or four similar little snippets of allegations
11 that are along those same lines.

12 THE COURT: Okay.

13 MR. HARVIS: Including that the officer -- I'm
14 sorry.

15 THE COURT: No, go ahead.

16 MR. HARVIS: I was going to say, you know, for
17 example, another example is that the victim was told that his
18 friend who didn't witness the shooting but witnessed a period
19 of time before the shooting had also, the victim was told that
20 his friend had also picked the same person, for example, in
21 the notes.

22 THE COURT: And she made that notation in her notes,
23 right?

24 MR. HARVIS: Correct. Correct.

25 THE COURT: Okay. I see. So she would testify that

1 that's what he told her, right?

2 MR. HARVIS: Right. We would basically be
3 establishing that it's a business record and she had a duty to
4 record it and so forth and, like Your Honor said, a hearsay
5 exception.

6 THE COURT: Do you need her to put that into
7 evidence? I'm not really asking you to try your case right
8 now. I'm just -- I mean, I would try to analogize this to,
9 let's say in state court, there was a 440.10 hearing at which
10 the judge decided to set aside the conviction and he, and say
11 the judge credited the witnesses. I don't think the judge
12 testifies, right?

13 MR. HARVIS: Right.

14 THE COURT: But the testimony that came out during
15 the course of the hearing would come in. I'm just wondering.
16 I mean this is sort of a very long way of saying do we need --
17 I mean, how much do we need -- why do we need to disqualify
18 them from representing everyone and how much of a witness is
19 she actually going to be?

20 MR. HARVIS: Yes. I mean, I have a little more to
21 say about that, Your Honor, if you don't mind.

22 THE COURT: Sure. Sure. No, go right ahead.

23 MR. HARVIS: Thank you.

24 So in our view, she's really an important witness
25 from our point of view because if you look at your analogy

1 with a 440 hearing, a judge will reduce their findings to an
2 opinion which everybody has the benefit of, whereas, here,
3 that information is really kept in the mind of Ms. Anania. So
4 we don't have the benefit of -- I mean she did make a
5 statement on the record but her, you know, review and
6 investigation was significantly more expansive than what was
7 contained in her first spoken remarks which themselves are
8 somewhat the subject of controversy because we have her drafts
9 of those remarks and she made changes to them that are
10 probative.

11 You know, for example, she had written an earlier
12 draft that the wrongful conviction was not the result of
13 police misconduct, but then she crossed that out when she
14 finally gave her remarks to the court. So it's an open
15 question from our point of view, you know, how she viewed the
16 role of police misconduct in what everyone agrees was a
17 wrongful conviction.

18 THE COURT: But why --

19 MR. HARVIS: So we think that -- yes.

20 THE COURT: But I don't understand why she would be
21 able to testify about that because her impression of whether a
22 witness is credible, whether to believe the victim or whether
23 to believe the detectives, I don't see how that comes into
24 evidence at trial and I realize, I'm not making pretrial
25 rulings by any stretch of the imagination.

1 I can see like in the Race case, Blake against Race,
2 I think the Assistant District Attorney who testified there
3 actually was involved in the prosecution of the investigation
4 of the initial case. Here, we have somebody looking at it ten
5 years later and making a decision about it.

6 So, you know, and I actually have never taken one of
7 these all the way to trial so maybe I'm, this is the failure
8 of imagination on my part, but in the case where the judge
9 makes a decision and, you know, writes an opinion, sometimes
10 they do, sometimes they don't, but the jury doesn't get that,
11 do they? I don't think --

12 MR. HARVIS: I don't know. I hear the parties
13 stipulated about that, but there's kind of two interlocking
14 points that I want to make about that.

15 I mean, one is, in our view, Ms. Anania, the ADA in
16 this case, is the only person who spoke to these witnesses
17 that the DA used to determine that Mr. Galloway was innocent.

18 THE COURT: Right.

19 MR. HARVIS: So we don't have, we don't have any
20 other way -- and part of our case is, part of our proof of our
21 case is proving that those innocent witnesses were giving
22 correct testimony. So she's a vital witness in order to
23 establish not the credibility of those people, but the facts
24 that came into the possession of the DA's office in the same
25 way that you would look during a criminal prosecution at

1 exculpatory evidence, for example, that was given to the
2 prosecutor.

3 Those questions of sequence and of the content of
4 information that came from the DA's office would, in our view,
5 come properly before the jury and just taking it a step
6 further, because we now all agree that there was this conflict
7 and there was this ethical lapse in the decision to represent
8 her.

9 THE COURT: Although I'm not sure -- I don't know if
10 we all agree with that but probably.

11 MR. HARVIS: Most of us. Most of us agree. You
12 know, it's now, it now has elevated itself into an issue at
13 the trial because now from our point of view, the only reason
14 why we can imagine that the conscious decision was made to
15 have the same attorney represent Ms. Anania that was
16 representing the officers is because the County could not
17 fairly defend its case if Ms. Anania was permitted to testify
18 in a full and complete manner.

19 So, therefore, we're going to want to be able to
20 present to the jury the theory that, and make arguments along
21 the lines of, you know, that was, that betrays some
22 consciousness, call it consciousness of guilt or call it, you
23 know, some sort of a deliberate decision in which they decided
24 that they had to interfere with her testimony in order to
25 create a defense for their case.

1 We think that to have the same attorney, this goes
2 back to Your Honor's initial question which is why isn't
3 counsel sufficient, because we think to have the attorneys
4 that engaged in that sort of shenanigans at counsel's table
5 even if they're not presently representing the ADA is the kind
6 of, the quality of taint that we think is sufficient to
7 warrant disqualification or at least create sufficient doubt
8 about it that under the Hull case in the Second Circuit, you
9 know, favors disqualification and that, that's the reason why
10 we think, one of the reasons.

11 And if I may, if Your Honor would just indulge me
12 for just one more minute?

13 THE COURT: Go ahead.

14 MR. HARVIS: Thank you.

15 Part of the theory of the defense here that's been
16 advanced through deposition questioning is about the
17 legitimacy of the DA's reinvestigation and there's been a
18 theory presented by the defense that, that this was a flawed
19 reinvestigation, that they didn't go about it the right way,
20 that all they did was bring in the victim and show him a
21 picture of Galloway and say, you know, isn't this the shooter
22 and, therefore, they're going to want to get up and they
23 basically are going to want to cross-examine their own former
24 client about that.

25 So those are really the two strands that we think

1 make disqualification necessary here.

2 THE COURT: Okay. Let me ask Mr. Sokoloff.

3 So I don't want you to waste a whole lot of time on
4 whether there's a conflict question, I agree with Judge Wicks
5 that there is with respect to the Assistant District Attorney,
6 but let me just ask you is that your defense, that the
7 reinvestigation was also flawed?

8 MR. SOKOLOFF: No, absolutely not. We don't --
9 we're not arguing, we're not arguing and never have that
10 Mr. Galloway committed the crime at this point. There might
11 be some quibbling about what the 440 exoneration means. It
12 means that he wasn't proven guilty but it's not as Mr. Harvis
13 tries to couch it, that, you know, somebody pronounced him
14 innocent. He's not guilty of that crime. We don't dispute
15 that.

16 THE COURT: Okay. So what is your -- and in terms
17 of the Assistant District Attorney -- I keep forgetting her
18 name. I'm sorry.

19 MR. SOKOLOFF: Anania.

20 THE COURT: Ms. Anania, is she a witness that you
21 would call?

22 MR. SOKOLOFF: No, there's no need to call her.

23 Your Honor, can I just add something here? If we
24 were to have an evidentiary hearing, Your Honor would learn
25 from Ms. Anania that their decision to exonerate Mr. Galloway

1 did not turn in the least on any finding of police misconduct.
2 She doesn't know of any police misconduct. She wouldn't
3 testify to any police misconduct. That's not -- that's not --
4 she didn't investigate police misconduct. She didn't find
5 police misconduct. She knows of no police misconduct.

6 THE COURT: Well, I mean, again, can I just say,
7 again, I think both of you are doing this a little bit --
8 Ms. Anania's opinion about any of these matters is really not
9 relevant at a trial about, which is really a trial that
10 whether these things occurred. I don't think there's any
11 exception that would permit somebody to say, you know, I
12 talked to this person and I think the person is credible, I
13 talked to this person and I don't think there was police
14 misconduct.

15 I don't recall every bit of her testimony. My
16 recollection was that there's another person who's much more,
17 who she thinks did it. I mean, it sounded like there were a
18 combination of factors but, again, I don't think she can
19 testify to any of that at a trial any more than, you know, at
20 a criminal prosecution, but Mr. Harvis also points out that
21 just the very fact that the County, A, chose to have an
22 Assistant District Attorney represented by counsel and, B,
23 chose to have it be the same counsel as the detectives or the
24 police officers, who was representing the police officers
25 whose conduct she necessarily looked at as part of the

1 investigation and whose conduct is the subject of this case.
2 That's why Judge Wicks made the decision he did and, in my
3 view, an extremely thoughtful opinion.

4 My only question was, as I say, my question was
5 really one more of practicality. I'm not entirely sure I
6 understand the theory from Mr. Harvis that counsel, I don't,
7 maybe it's a failure of imagination on my part, I don't know,
8 that the County decided that they didn't want the DA to
9 testify to something. I mean, I suppose the Assistant
10 District Attorney may have some independent, independent
11 obligation as an officer of the court to testify truthfully
12 but I don't, I don't think anybody is asserting that once her
13 prior deposition came out, that there was anything missing.

14 In any event, I mean, I think the issue is an
15 interesting one. What I'd like to do is give it some more
16 thought because, in terms of that particular question, whether
17 the Sokoloff firm has to be disqualified from representing the
18 other defendants. I agree that they can't represent the
19 Assistant DA. So I mean if you all want to submit a letter to
20 me on this topic, I'll certainly consider it.

21 There are two other things that I want you to
22 consider in the interim. One thing is I know Judge Wicks
23 knows this case very well and I know you all hate coming out
24 to Brooklyn and so --

25 MR. HARVIS: Wait. I don't.

1 THE COURT: So if you want to consider to consenting
2 to his jurisdiction, I'm just throwing that out there.
3 Usually when we get Nassau County cases, people act as though
4 we're requiring them to go to Siberia. And he knows the case
5 very, very well.

6 The second thing is I don't know to what extent you
7 all have tried to settle this case. It seems to me that that
8 might be something worth looking into.

9 Have you made any efforts to do that? Let me start
10 with the plaintiff.

11 MR. HARVIS: Thank you, Your Honor. Yes, I mean,
12 well, this was -- Your Honor mentioned that when we appeared
13 before Your Honor in March of 2020 right before the pandemic.

14 THE COURT: I always mention it. Yes.

15 MR. HARVIS: And actually Judge Orenstein who was
16 previously presiding also mentioned it at the judicial
17 conference which was in April of 2020.

18 We have tried to, you know, to kind of sniff around
19 and see if there was interest and we really gotten no, we've
20 never gotten an offer or any real indication that defendants
21 are interested so there hasn't been any headway but we're very
22 open to it and would happy to participate in anything, you
23 know, in that connection.

24 THE COURT: What about you, Mr. Sokoloff? There's
25 two things we can do. We can schedule a settlement conference

1 with Judge Wicks. The court also has an excellent mediation
2 program that has achieved a pretty good rate of success in
3 settling these cases.

4 Is that something that you'd be, either one of those
5 things something that you would be open to?

6 MR. SOKOLOFF: I suppose that I would but it's not
7 my opinion. I need to run that by my client, at least they
8 are my client now for this moment.

9 THE COURT: Right.

10 MR. SOKOLOFF: I'll be happy to discuss that with
11 them as the Court's suggestion.

12 THE COURT: Why don't we do this. Why don't you
13 discuss it with your client.

14 I take it, Mr. Harvis, for this little period, you
15 don't have any objection to me tabling the ultimate decision
16 on disqualification, do you?

17 MR. HARVIS: I don't. I don't, Your Honor. The
18 only thing I would say is I think I just want, the mechanics
19 of it, I just want to discuss it with our outside ethics
20 counsel just to make sure.

21 THE COURT: Of course.

22 MR. HARVIS: I don't see any reason why that would
23 be a problem.

24 THE COURT: Okay. Yes, double check because I
25 realize, sometimes, you know, I think it's an interesting

1 question here and maybe the fact that it's an interesting
2 question is the reason to go ahead and make a decision, but
3 I'm just not entirely clear, the subject, if you want to write
4 a letter on it and I would maybe do this. After you sit down,
5 if your ethics counsel says it's okay, after you, if you can
6 try to reach a resolution and then if you can't, then you can
7 just give me your thoughts on that limited question of whether
8 it's necessary to disqualify Mr. Sokoloff's firm from
9 representing everybody. I don't have an opinion really about
10 it one way or the other at this moment. I'm just, I would
11 like your thoughts on that if it comes to that.

12 Does that sound like a plan?

13 MR. HARVIS: I certainly agree with you, Your Honor.
14 I would just want to include Mr. Garry on behalf of the
15 Village of Hempstead who's on the line.

16 THE COURT: Oh, sure.

17 I'm sorry, Mr. Garry.

18 MR. GARRY: That's okay. I don't really feel left
19 out at this point.

20 THE COURT: Okay. Is there anything that you want
21 to -- I do apologize. I get carried away sometimes. Is there
22 anything that you want to add?

23 MR. HARVIS: No, Your Honor.

24 THE COURT: I meant Mr. Garry.

25 MR. GARRY: No. The answer is no.

1 THE COURT: Okay. Good.

2 So just in terms of a timetable, Mr. Sokoloff is
3 going to check with his client and Mr. Harvis is going to
4 check with ethics counsel. That's step one on whether we even
5 want to go forward with any kind of an attempt to resolve the
6 case.

7 How much time do you think that would take?

8 MR. HARVIS: I would say a week, Your Honor.

9 THE COURT: Is that Mr. Harvis who said that?

10 MR. HARVIS: It is Your Honor. Sorry. Thank you.

11 THE COURT: That's okay. I just wanted the court
12 reporter to be able to get it.

13 And Mr. Sokoloff, is that okay with you?

14 MR. SOKOLOFF: Well, it's a good question that you
15 ask. There are two variables here. Three.

16 THE COURT: Okay.

17 MR. SOKOLOFF: Number one, there's a new
18 administration taking office in Nassau County and I'm not sure
19 where things stand with a new County Attorney who obviously
20 would want to be involved in this because it's a high profile
21 case. Then the legislature has to get involved and there has
22 to be settlement authority above a certain amount. This is my
23 first Nassau County case of this magnitude.

24 THE COURT: Right.

25 MR. SOKOLOFF: And I'm not sure what channels have

1 to be followed. It's not like when I represented the City of
2 New York where you call the Controller --

3 THE COURT: No.

4 MR. SOKOLOFF: -- to get an answer. This is a
5 little more convoluted.

6 THE COURT: Let me pause there because, I mean, I've
7 had a number of these cases and the legislature thing, I
8 think -- sorry, I'm completely blanking -- I think plaintiff's
9 counsel, Mr. Harvis, will agree with this. The part about
10 going to the legislature usually comes after the parties have
11 managed to hammer out a solution.

12 Am I right about that, Mr. Harvis?

13 MR. HARVIS: In my experience, yes, Your Honor.

14 THE COURT: I think that's for the later steps.

15 I suppose it's possible that you can have this new
16 administration that has a policy of never settling anything,
17 that would be kind of surprising, but why don't we do this.
18 Why don't you give us a status update in two weeks. That
19 should be sufficient just to find out if it's worth it. And
20 that would take -- and just let us know by letter.

21 MR. SOKOLOFF: Yes.

22 THE COURT: Same thing for you, Mr. Harvis.

23 MR. HARVIS: Yes.

24 THE COURT: And then we'll just take things from
25 there. And Mr. Garry, same for you.

1 So that takes us to -- today is the 11th -- the
2 25th?

3 THE CLERK: Yes, Judge.

4 THE COURT: Is that right? Okay. So January 25th,
5 can you give us a status update? Then if you decide you do
6 want to go forward with some effort to resolve it, then let me
7 know whether you want to go to Judge Wicks who's brilliant at
8 this or if you want to go the mediation route.

9 Anything else that anybody wants to put on the
10 record?

11 MR. HARVIS: No. This is Gabe Harvis, Your Honor.

12 So all three parties will put in letters by
13 January 25th and we'll confer in advance assuming that
14 everyone wants to have a conference about, a settlement
15 conference about whether that makes sense to have before
16 Judge Wicks or go to a private mediator. Do I have that
17 right?

18 THE COURT: That's great. You can send a joint
19 status letter. That's fine.

20 MR. HARVIS: Sounds good. Thank you. I have
21 nothing else from the plaintiff.

22 THE COURT: What about you, Mr. Sokoloff?

23 MR. SOKOLOFF: The only thing that I would want to
24 put on the record, I don't think I did when we were discussing
25 the motion, is my agreement with Your Honor about the

1 extremely limited role that Ms. Anania would have at trial.

2 There's no dispute about the content of her notes.
3 We would not -- we would agree her notes say what they say,
4 she accurately reported what she says the people told her, so
5 we wouldn't cross-examine her at all and that's the role that
6 she would have in the trial. She wouldn't need representation
7 at the trial.

8 THE COURT: I don't know why -- I have to say,
9 again, maybe I'm just not thinking very clearly, but I can't
10 imagine why she would have ever needed representation in the
11 first place.

12 MR. SOKOLOFF: Well, at the time --

13 THE COURT: It's such a limited -- you don't have to
14 explain it. It doesn't make any sense. She's not a
15 defendant. The District Attorney's Office is not a defendant.

16 MR. SOKOLOFF: The original complaint in this case,
17 by the way, had the District Attorney as a defendant.

18 THE COURT: Yes, the office, I guess. Did it?

19 MR. HARVIS: We took them out, Your Honor. That was
20 filed by a prior counsel to Mr. Galloway. As soon as we came
21 on the case, we took them out immediately. They were not on
22 the case when Ms. Anania was deposed.

23 THE COURT: They hardly ever are. So, anyway, let's
24 try to look forward, not backward.

25 You know, the point that I was trying to make is I

1 always try to think of what a trial is going to look like in
2 any case and I just kind of imagined, you know, it seems to me
3 almost that you can stipulate to some of the stuff that she
4 was going to say but who knows.

5 In any event, you'll file a status letter on
6 January 25th. I thank the parties for the thoughtful briefing
7 and we'll wait to see what happens. Okay?

8 MR. SOKOLOFF: Very well.

9 MR. HARVIS: Your Honor, I'm sorry, just one more
10 thing if I may. I apologize. It's Gabriel Harvis.

11 THE COURT: Yes.

12 MR. HARVIS: We'll set a deadline for submission of
13 these supplemental letters once we look at the question of the
14 settlement conference, is that right?

15 THE COURT: Yes, indeed. That's fine.

16 MR. HARVIS: Okay. Sounds good. Thank you very
17 much, Your Honor.

18 THE COURT: Yes. Why make work when we don't have
19 to do it.

20 All right. Thank you so much.

21 MR. SOKOLOFF: Thank you, Your Honor.

22 MS. FETT: Thank you, Your Honor.

23 MR. HARVIS: Thank you, Judge.

24 MR. GARRY: Have a nice day.

25 (Matter concluded.)